



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-92-13

FACTS:

You are an officer of a private consulting corporation offering policy development and other management advisory services to government and health care providers. In particular, you have over ten years experience in mental health and hospital management. Your firm has had numerous contracts with various state agencies to provide expertise to the Commonwealth in the area of health and mental health planning and financial management.

Recently, the Commonwealth has received responses from acute general hospitals to a Request for Proposals (RFP) to provide psychiatric care as part of the Commonwealth's proposed privatization of mental health care. A new RFP has been released, seeking assistance in the evaluation of the hospital proposals and in the implementation of contracts with the hospitals. Your firm is one of the firms which has been selected to perform these services. The firm's responsibilities will include: formulating baseline data by reviewing the financial information provided by the hospitals and developing objective measures to judge the hospital's proposals; developing a risk analysis tool to assist the DMH in determining which of the hospital responses may present too much risk; and assisting DMH in its negotiations with the selected hospitals.

The executed contract expressly names you as the project director and names four other firm employees to be project managers. Each of these individuals' resumes is attached and incorporated by reference into the contract. Each of the named individual's qualifications in pertinent areas is diagramed in a chart in the response to the RFP. Each of the individuals is also noted on an organization chart for the program. According to your response to the RFP, which is incorporated into the contract, the project managers will: "manage the daily project tasks and administrative matters and act as liaison with the Commonwealth's designated contract persons; coordinate, direct, and supervise the conduct of work plan activities and tasks performed; manage the project budget, resource requirements, and work schedules; plan and monitor the execution of the project; manage the preparation of progress reports; and provide technical guidance." See Response, V-3. Your response notes that this project will require managers with expertise in health care and hospital financing, as well as expertise in the legal/regulatory and program policy aspects of the project. See Response V-4. Each of the named individuals has experience in each of these areas and most of the individuals have past experience working in other health policy projects involving the Commonwealth. Also, you agreed to obtain prior written approval from the Commonwealth prior to substituting management, supervisory, or key professional personnel named in the contract. Response I-3.

You state that all of the parties specifically seek your expertise in this project and that you will be considered a special state employee under G.L. c. 268A, but you question whether the other named individuals in your firm will also be considered state employees.

QUESTION:

Are the other four named individuals considered to be state employees under G.L. c.268A, §1(q), by virtue of the contract between the Commonwealth and the firm?

ANSWER:

Yes.

DISCUSSION:

In the enactment of G. L. c. 268A, the Legislature established an expansive definition of the term “state employee”.^{1/} This definition covers not only individuals who hold full-time employment with a state agency, but also consultants who provide services on an intermittent basis, whether or not they receive any compensation. *See, e.g., EC-COI-89-35* (private consultants state employees where services expressly contracted and agency contemplating specific expertise); *86-21* (private artist is a state employee where specific services contracted for); *85-4* (president of consulting group is a state employee where services being provided are within his expertise); *83-129*. However, the fact that a corporation contracts with the state, without more, does not confer state employee status on all of the employees of the corporation. *See, e.g., EC-COI-92-6; 86-21* (project manager without more is not a state employee by virtue of employer’s contract with state agency); *83-39* (contract calls for services of firm as a whole, not individuals); *85-4* (same). For example, in *EC-COI-86-21* a question arose whether an individual who was named in a contract to perform artwork and an individual who was not specifically named but who was the project director were state employees for purposes of G.L. c. 268A. In finding that the named individual was a state employee, but that the project manager was not, the Commission stated that “such an employee is covered by the definition if the terms of the contract indicate that his specific services are being contracted for.” *EC-COI-86-21; see also, EC-COI-83-165* (consultant specifically named, contract also identified compensation and personnel schedule for work); *83-129* (named project leader and state required to consent to any change of leader); *80-84* (contract specifically contemplates all partners in firm will work on project).

The Commission has established certain factors it will weigh in determining whether an individual who is an employee or officer of a private corporation which

contracts with a public entity will be deemed to be a public employee. *EC-COI-87-19; 87-8*. These factors include:

1. whether the individual’s services are expressly or impliedly contracted for;
2. the type and size of the corporation;
3. the degree of specialized knowledge or expertise required of the service. For example, an individual who performs highly specialized services for a corporation which contracts with a public agency to provide those services may be deemed to be performing services directly to that agency;
4. the extent to which the individual personally performs services under the contract, or controls and directs the terms of the contract or the services provided thereunder; and
5. the extent to which the person has performed similar services to the public entity in the past. *EC-COI-89-35; 86-21; 87-19*.

No one factor is dispositive; rather the Commission will balance all of the factors based on the totality of the circumstances. After weighing your circumstances, we conclude that the individuals in your firm who are named in the contract are state employees under the conflict of interest statute.^{2/} Of significance are the facts that each individual is expressly named in the contract, designated on the organization chart, and delegated specific tasks to perform under the contract. Additionally, you may not substitute other persons in these positions without notifying and, presumably, receiving permission from the Commonwealth. We also note that the contract emphasizes the expertise of the individuals in the area of healthcare financing and policy, which are the areas in which the Commonwealth is seeking assistance. *See, EC-COI-89-35* (where contract mentions references to health care management and consultant’s prior experience in field, state agency could reasonably infer it was obtaining consultant’s expertise in this area under contract).

This is unlike the situation where the officers of a corporation enter a contract with the state and provide no further services other than general oversight of their employees, or where a contract specifies a generic program manager. *See, EC-COI-89-6*. Viewing the totality of the contract, it is apparent that the Commonwealth is seeking specific expertise in health care management and financing, and by the selection of your firm, the agencies could reasonably infer that the named individuals would provide that expertise. Finally, we see no evidence in the contract that the agencies intended to treat your status differently from the other individuals so

named or that the other individuals were not necessary to the performance of the contract.^{3/}

Date Authorized: April 13, 1992

^{1/}"State employee," a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council.

^{2/}We call your attention to the conflict of interest provision in the Commonwealth contract which you signed, which states "The Contractor understands that any person individually named in Attachment C (key personnel) ... to provide services under this Contract may become a special state employee subject to the provisions of Chapter 268A of the General Laws." Each of the individuals in question was individually named in Attachment C.

^{3/}While the parties may not, by contract, obviate the application of G.L. c.268A, they may amend or draft a contract based upon the firm's ability, rather than an individual's ability, to provide services. *See, EC-COI-86-21; 83-89* (contract calls for services of firm as a whole, not individuals); *82-134* (agency contracted for services of corporation, not individual).